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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SEAN HUGHES, Defendant and Appellant.	F070398 (Kern Super. Ct. No. MF011041A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Eileen Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Poochigian, J. and Franson, J.

Appellant Sean Hughes appeals his conviction on one count of making criminal threats (Pen. Code, § 422)[1] with five prior serious or violent felony convictions (§ 667, subds. (c)-(j), and § 1170.12, subds. (a)-(e)), two of which qualify for five-year enhancements (§ 667, subd. (a)(1)), and an additional enhancement requiring he serve his sentence in state prison (§ 1170, subds. (f) & (h)(3)). Appellant contends the trial court erred by admitting evidence of prior threats he had made. Appellant also alleges error when the trial court rejected his proposed jury instruction. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Since 1992, appellant has been serving a life sentence at the California Correctional Institution (CCI) for crimes including kidnapping, robbery, and burglary. He suffers from degenerative disk disease in his back and is prescribed pain medication. He is also permitted to use a cane.

Dr. Harold Tate is a physician at CCI. On October 21, 2013, Dr. Tate discontinued appellant's pain medication. It had been alleged that appellant was "fishing" his medication—refusing to comply with narcotic protocols requiring a mouth inspection after pills are taken so that he could transfer his medications to another inmate. On November 8, 2013, Dr. Tate conducted a medical interview with appellant concerning this issue. At the medical interview, appellant admitted to passing medication to another inmate and Dr. Tate informed him that he would not restore appellant's prescription.

At that point, appellant directed a racial epithet to Dr. Tate, stated "that is why I'm fucking going to kill you," and followed that with another racial epithet and a derogatory term for women. Dr. Tate feared for his safety and immediately left the area. That same day, Dr. Tate signed an order confiscating appellant's cane and neck brace.

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[1] All statutory references are to the Penal Code, unless otherwise noted.

Dr. Tate testified that the fear he felt from appellant's threat was partially based on two prior incidents where appellant had threatened to harm Dr. Tate. Both of these incidents occurred in 2011, while Dr. Tate was appellant's treating physician. In the first, appellant verbally threatened to harm Dr. Tate. In the second, appellant sent a letter containing threats to kill Dr. Tate. Dr. Tate was not present for the verbal threat and did not read the written threat, but was advised of both. As a result of those threats, and the fact that he resided in subsidized housing near the prison grounds, Dr. Tate sent his adult son, who had been living with him part time, to live elsewhere. Appellant was also transferred out of Dr. Tate's care.

Additional information about these prior threats was introduced through the testimony of Dr. Stacey Adair and David Carter. Dr. Adair is a staff psychologist at CCI who was present when appellant made his verbal threat in 2011. Dr. Adair testified that, at the conclusion of an interdisciplinary team meeting involving appellant and several staff involved in his psychological treatment and at a time when inmates are given a chance to express pending frustrations, appellant stated, "[i]f I have to see Dr. Tate again I'll kick him in the head. I'll fucking hurt him," and "you better watch it, bitch. I'm going to get him."

Mr. Carter was a correctional counselor at CCI in 2011. He testified to receiving a letter from appellant through the prison mail system. A portion of the letter was read for the jury. In it, appellant claims Dr. Tate is a proven liar who is vindictively retaliating against appellant with respect to his medical care. Appellant then makes several threats, writing ". . . I do not care if I live or die so I may as well try to make that piece of shit die too"; "So to put it bluntly, I don't give a fuck anymore. I tried the right way. Now it's kill or be killed"; and "When I get my chance on this . . . doctor I'm going to take it--take it next month or next year. [¶] There's nothing you . . . can do about it."

Based on the 2013 incident, appellant was charged with making criminal threats. Prior to trial, the People moved *in limine* to admit evidence concerning the prior threats

against Dr. Tate, as well as other threats made by appellant. Appellant moved to exclude the same evidence. After a lengthy analysis, the trial court disallowed testimony as to all prior threats except the two directed to Dr. Tate.

At trial, appellant developed evidence and argued the theory that his reaction was merely an angry outburst brought on by the loss of his pain medication and, thus, was not a criminal threat. In line with this theory, appellant proposed the following pinpoint jury instruction: "[Penal Code Section 422] was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others.[ ] In other words, section 422 does not punish such things as 'mere angry utterances or ranting soliloquies, however violent.[']" The trial court reviewed the instruction, and the case law it was based upon, and determined that the instruction properly targeted the intent element of the crime charged but improperly described the potential criminal nature of emotional outbursts. To remedy this deficiency, the court added the following language to the jury instruction detailing the elements of the crime charged: "However, a threatening statement does not violate this law unless it is made with the intent that it be understood as a threat." The court did not give appellant's proposed instruction.

Appellant was convicted by jury on the charge of making criminal threats, and the trial court found the charged enhancements true. This timely appeal followed.

DISCUSSION

Appellant identifies two rulings he alleges violated his due process rights: (1) when the trial court admitted evidence regarding the 2011 threats to Dr. Tate; and (2) when the trial court denied his requested pinpoint jury instruction.

Admission of Prior Acts Evidence

Appellant's argument that the trial court erred in admitting evidence of prior threats against Dr. Tate turns on whether the probative value of that evidence is substantially outweighed by its prejudice to appellant. (Evid. Code, § 352.) Whether the

evidence was improperly admitted requires consideration of the grounds upon which the evidence was introduced; in this case, Evidence Code section 1101, subdivision (b).

Standard of Review and Applicable Law

"The rules governing the admissibility of evidence under Evidence Code section 1101(b) are well settled. Evidence of defendant's commission of other crimes, civil wrongs or bad acts is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." (*People v. Cage* (2015) 62 Cal.4th 256, 273 (*Cage*).)

Even if admissible under Evidence Code section 1101, evidence of prior bad acts must also satisfy Evidence Code section 352. (*People v. Leon* (2015) 61 Cal.4th 569, 597-598.) Section 352 requires consideration of " 'whether the probative value of the evidence "is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " " (*Leon, supra,* at p. 599.)

We review for an abuse of discretion. (*Cage, supra,* 62 Cal.4th at p. 274.)

The Testimony was Properly Admitted

Upon review of the record, it was not an abuse of discretion to admit the testimony about appellant's prior threats towards Dr. Tate. Appellant's history of threatening to harm or kill Dr. Tate, and the fact these threats were communicated to Dr. Tate, was undoubtedly relevant to whether appellant's singular, and somewhat undefined, statement of "that is why I'm fucking going to kill you" was intended to be a threat. (*People v. Garrett* (1994) 30 Cal.App.4th 962, 967 [finding wife's knowledge of prior bad acts "extremely relevant and probative" on issue of intent and noting that evidence will rarely be excluded "when it is the primary basis for establishing a crucial element of the charged offense"].) It is equally probative on whether the threat created a reasonable and sustained fear in Dr. Tate. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Indeed,

circumstances surrounding an alleged criminal threat, including related conduct from the past, is routinely admitted in cases such as these. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431-1432 [summarizing cases].) While some prejudice would arise from admitting evidence of similar instances of threatening behavior, the prejudice would not be undue and is readily outweighed by the relevance attached to specific prior instances of threats against Dr. Tate. (*Cage*, *supra*, 62 Cal.4th at p. 275.)

Appellant argues his prior threats have minimal probative value because they were not made to Dr. Tate and because they were not acted upon. In doing so, appellant relies on *People v. Bush* (1978) 84 Cal.App.3d 294, claiming the evidence does nothing more than raise possible grounds of suspicion as to why the crime was committed and, therefore, could only confuse the jury. We disagree. As shown above, the evidence was directly relevant to critical aspects of the charged offense and was not so secondary to the issues as to be immaterial or confusing.

Appellant's additional reliance on *People v. Felix* (2001) 92 Cal.App.4th 905 (*Felix*), in this context is misplaced. In *Felix*, the defendant could not be convicted of making criminal threats when there was no factual basis to conclude the defendant intended those threats to reach the victim. (*Id.* at pp. 913-914.) Here, in contrast, the relevant threat was made directly to the victim. While appellant may have directed his conduct in 2011 to someone other than Dr. Tate, *Felix* only bears on whether he could be charged for those statements. *Felix* says nothing about the probative nature of those statements, and of the knowledge that they were made, on appellant's intent when making a later threat.

Finally, the fact that appellant did not act on his threats in 2011 does not lessen the probative value of those threats with respect to appellant's intent or Dr. Tate's fear. " 'A threat is not insufficient simply because it does "not communicate a time or precise manner of execution, section 422 does not require those details to be expressed." ' [Citation.] In addition, section 422 does not require an intent to actually carry out the

threatened crime. [Citation.] Instead, the defendant must intend for the victim to receive and understand the threat, and the threat must be such that it would cause a reasonable person to fear for his or her safety or the safety of his or her immediate family." (*People v. Wilson* (2010) 186 Cal.App.4th 789, 806.) In this case, appellant made multiple indirect threats to Dr. Tate in 2011, resulting in his removal from Dr. Tate's care. Upon encountering Dr. Tate again in 2013, appellant reiterated his threats directly to Dr. Tate. Such facts are highly probative of appellant's intent to actually threaten Dr. Tate and of Dr. Tate's stated fear.

Having found the testimony was properly admitted, we see nothing in its admission that would render appellant's trial fundamentally unfair and, thus, violate his due process rights. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Denial of Pinpoint Instruction Request

Appellant's claim that the trial court improperly rejected his requested pinpoint jury instruction depends upon whether his proposed instruction articulates a valid legal principle, supported by the evidence.

Standard of Review and Applicable Law

" '[I]n appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case . . . ." (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) As a general rule, however, "a trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence." (*People v. Moon* (2005) 37 Cal.4th 1, 30 (*Moon*).)

We review claims of instructional error de novo. (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

The Proposed Instruction was Improper

The trial court did not err when it denied appellant's proposed instruction. It is simply not the case that emotional outbursts and angry utterances cannot be the basis for

conviction under Penal Code section 422. To hold otherwise would limit the reach of the statute to only those instances where threats of violence were made without emotion—a rare and perhaps impossible case to find.

Appellant's pinpoint instruction attempted to combine separately cited statements from *Felix*, *supra*, 92 Cal.App.4th at pages 913-914, to suggest that emotional outbursts and angry utterances, no matter how violent, are not within the scope of section 422. But the cases cited in *Felix* do not stand for propositions that can be combined in such a way.

Felix cites *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1141 (*Ricky T.*) for the proposition that "Section 422 was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others." (*Felix, supra*, 92 Cal.App.4th at p. 913.) While it is true that *Ricky T.* says some emotional outbursts are outside of the scope of section 422, *Ricky T.* is not the sweeping proclamation appellant suggests.

In *Ricky T.*, the court first found no true threat was made when, after being inadvertently struck on the head by a door, a student stated he would attack his teacher. (*Ricky T., supra,* 87 Cal.App.4th at p. 1137.) This conclusion was supported by the lack of an immediate response by the school and the lack of a history of animosity between the student and the teacher. (*Id.* at p. 1138.) The court then further found that the threat could not create a sustained fear in the teacher. (*Id.* at pp. 1139-1141.) Having thus resolved the case, the court stated: "It is this court's opinion that section 422 was not enacted to punish an angry adolescent's utterances, unless they otherwise qualify as terrorist threats under that statute. . . . Although what appellant did was wrong, we are hesitant to change this school confrontation between a student and a teacher into a terrorist threat." (*Id.* at p. 1141.) Through this dicta, the court did not conclude that the statute failed to reach "angry utterances" in general. Rather it made the common sense observation that certain types of angry responses do not rise to the level of a credible threat.

Felix confirms the limited nature of *Ricky T.'s* analysis by immediately following the citation used by appellant with another limiting example of the outer bounds of section 422's reach—this time from *People v. Teal* (1998) 61 Cal.App.4th 277, 281 (*Teal*)—explaining that "[o]ne may, in private, curse one's enemies, pummel pillows, and shout revenge for real or imaged wrongs--safe from section 422 sanction." (*Felix, supra,* 92 Cal.App.4th at p. 913.)

Later in the *Felix* opinion, the court cites again to *Teal* for the proposition that " '[s]ection 422 is not violated by mere angry utterances or ranting soliloquies, however violent.' " (*Felix, supra,* 92 Cal.App.4th at p. 914.) But as the previous quote to *Teal* shows, this statement refers to potential threats made when no other person is around to hear the threat. Indeed, in *Teal* the defendant argued that he could not be convicted under section 422 because no direct evidence showed he was aware that the victim of his threats was home when the threats were made. (*Teal, supra,* 61 Cal.App.4th at p. 281.) In rejecting this argument, the court noted that angry utterances, made in private, were not criminal, but made clear that "if one broadcasts a threat intending to induce sustained fear, section 422 is violated if the threat is received and induces sustained fear--whether or not the threatener knows his threat has hit its mark." (*Ibid.*)

By attempting to combine two disparate concepts—that emotional outbursts not rising to true threats are not criminal and that statements truly made in private are not punishable—appellant's proposed construction was properly rejected as an incorrect statement of the law. (*Moon, supra,* 37 Cal.4th at pp. 30-31.) In addition, given the direct threat made to Dr. Tate, the second half of appellant's proposed construction—concerning ranting soliloquies—was not supported by substantial facts.

On appeal, appellant now concedes that "the legislature intended to punish emotional outbursts if the defendant intended them as threats" but argues that the true purpose of the instruction was to explain how "the legislature did not intend to punish such violent language if appellant did not mean it as a threat." While the trial court was

justified in rejecting appellant's pinpoint instruction for the reasons discussed, we note that it also resolved appellant's current argument when it modified the standard jury instructions to explain that "a threatening statement does not violate this law unless it is made with the intent that it be understood as a threat." This addition properly summarized the state of the law and addressed appellant's concerns. Thus, even if error existed, it would be harmless. (*Moon*, *supra*, 37 Cal.4th at p. 32.)

DISPOSITION

The judgment is affirmed.